APR 4 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 667

WILLIAM BOSCHEN,

Appellant,

against

HAMILTON WARD, Attorney General of the State of New York; JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, HARLOW M. FULLER, THOMAS McBURNIE, WILLIAM L. COOK and FREDERICK A. WOLL, constituting the Board of Optometry Examiners of the State of New York,

Appellees.

No. 668

S. S. KRESGE COMPANY,

Appellant,

against

HAMILTON WARD, Attorney General of the State of New York; JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, HARLOW M. FULLER, THOMAS McBURNIE, WILLIAM L. COOK and FREDERICK A. WOLL, constituting the Board of Optometry Examiners of the State of New York,

Appellees.

Appeals from the District Court of the United State for the Southern District of New York.

BRIEF FOR APPELLEES

HAMILTON WARD,
Attorney General of the State of New York,
HENRY S. MANLEY,
Assistant Attorney General,
Counsel for Appellees.

April 1, 1928.

TABLE OF CONTENTS

PAGE

The Question Stated 3

How the Question Arises 4

The Statute 4

Summary of Argument:

1. The sale of eyeglasses and lenses for the correction of vision is a matter so related to public health and safety that regulation of such sales is within the police power. This includes the magnifying eyeglasses sold by plaintiffs 6
2. We agree that section 1432-a of the Education Law does not place upon these appellants any duty to precede each sale with an examination, test or prescription 10
3. The statute is reasonably calculated to promote the public health, and has a real and substantial relation to that end. 12
4. The propriety of granting equitable relief in these cases is not clear 19
5. The court below correctly construed the statute and did not err in its decision 21
6. The court below did not err in its reasons for dismissing the bills against the defendants other than the Attorney General 21
7. The decrees below should be affirmed 22

Appendices:

Digest of statutes of forty-eight states regulating sales of spectacles, eyeglasses and lenses 23

Summary of digest 34

Education Law of the State of New York, Article 54, regulating optometry 36

TABLE OF CASES

	PAGE
Adams v. Tanner, 244 U. S. 590	13
Baker v. State, 91 Tex. Cr. Ap. Rep. 521	6
Burns Baking Co. v. Bryan, 264 U. S. 504	13
Burns, Matter of, 155 N. Y. 23	13
City of Milwaukee v. Rissling, 184 Wis. 517	16
Clark, Ohio ex rel., v. Deckebach, 274 U. S. 392	13
Commonwealth v. Houtenbrink, 235 Mass. 320	7
Commonwealth v. S. S. Kresge Co., Superior Ct., Mass., Dec. 20 1928	9
Euclid v. Ambler Co., 272 U. S. 365	13
Fletcher v. Peck, 10 U. S. 87	13
Graves v. Minnesota, 272 U. S. 425	13
Hallen, State ex rel., v. Bd. of Ex., 37 Utah, 339	6
Harris v. Bd. of Examiners, 287 Pa. 531	7
Hygrade Provision Co. v. Sherman, 266 U. S. 497	19
Liggett Co. v. Baldridge, 278 U. S. 105	13, 16
McNaughton v. Johnson, 242 U. S. 344	6
Mott v. Board of Examiners, 148 Ga. 55	7
Patsone v. Pennsylvania, 232 U. S. 138	13
People v. Griffith, 280 Ill. 18	7
Price v. Illinois, 238 U. S. 446	13
Price v. State, 168 Wis. 633	6
Purity Extract Co. v. Lynch, 226 U. S. 192	9, 13
Rissling v. Milwaukee, 271 U. S. 644	16
Rust, exparte, 181 Cal. 73	6
Saunders v. Swann, 155 Tenn. 310	7
State v. Zotalis, 172 Minn. 132	12
State v. Levine, 173 Minn. 321	12
State v. Fouch, 155 Tenn. 476	13
S. S. Kresge Co. v. Ottinger, 29 Fed. (2d), 762	4
United States v. Alford, 274 U. S. 264	11
Weaver v. Palmer Bros., 270 U. S. 402	13
Wechler v. Pizzutti, 276 U. S. 13	15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

WILLIAM ROSCHEN, Appellant, *against* HAMILTON WARD, Attorney-General of the State of New York, and others, Appellees.	No. 667
S. S. KRESGE COMPANY, Appellant, *against* HAMILTON WARD, Attorney-General of the State of New York, and others, Appellees.	No. 668

BRIEF FOR APPELLEES

QUESTION

The question presented, is whether chapter 379 of the Laws of New York enacted in 1928, prohibiting the sale at retail of spectacles, eyeglasses and lenses for the correction of vision, unless a licensed physician or optometrist is in charge of and personal attendance at the booth, counter or other place of sale, is in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution.

HOW THE QUESTION ARISES

The two several appellants, each engaged in selling, in New York City, eyeglasses for the correction of vision, and each asserting inability to continue in that business if compelled to comply with the statute (R 4, 6, 87, 88) brought suits against various state officers to enjoin enforcement.

The suits having been heard together, by three judges in accordance with Judicial Code section 266, decision was rendered denying the injunctions and dismissing the complaints. *S. S. Kresge Company* v. *Ottinger*, 29 Fed. 2nd, 762.

Direct appeals were taken to this court, also under provisions of Judicial Code section 266.

THE STATUTE

Sections 1425 to 1436 inclusive of the Education Law, comprising Article 54 of that law, regulate the practice of optometry in the State of New York. The complete Article is printed in the last pages appended to this brief. Section 1432-a, inserted by chapter 379 of 1928, is the section immediately relevant. The same chapter made an appropriate change to section 1434, which had previously provided a saving clause as to persons who neither practice nor profess to practice optometry, and who sell spectacles, eyeglasses or lenses either on prescription, "or as merchandise from permanently located and established places of business."

The legislative intention is not in doubt. The statute is a deliberate assertion of legislative power to regulate the sale of all spectacles, eyeglasses and lenses for the correction of vision.

After September 1, 1928, sales of those articles are regulated in the following particulars:

(a) They may not be "peddled" except by licensed optometrists and physicians.

(b) If an optometrist makes a sale (*quaere*, as to this) away from his office he must deliver to the customer a bill of purchase containing certain information. (Sec. 1430, last paragraph.)

(c) They must not be sold in any store or established place of business unless a licensed physician or optometrist, "be in charge of and personal attendance at," the place of business.

(d) These restrictions do not apply to persons who sell only on prescriptions, or who duplicate broken lenses.

(e) These restrictions do not apply to sales of toy glasses, goggles with plain lenses, or ordinary colored glasses.

SUMMARY OF ARGUMENT

In an endeavor to make our brief more directly responsive to that submitted on behalf of appellants, we shall take it up, point by point, under the following headings:

1. The sale of eyeglasses and lenses for the correction of vision is a matter so related to public health that regulation of such sales is within the police power. This includes the magnifying glasses sold by plaintiffs. The tendered issue that those are harmless in themselves and cannot possibly do any injury, is an issue not argued below, and is a conclusion not justified upon the present record or upon appeal to common knowledge.

2. We agree, that section 1432-a of the Education Law does not place upon these appellants any duty to precede each sale with an examination, test or prescription.

3. The statute is reasonably calculated to promote the public health, and has a real and substantial relation to that end.

4. The propriety of granting equitable relief in these cases is not clear.

5. The Court below correctly construed the statute, and did not err in its decision.

6. The Court below did not err in its reasons for dismissing the bills as against the defendants other than the Attorney-General.

7. The decrees below should be affirmed.

POINT I

The sale of eyeglasses and lenses for the correction of vision is a matter so related to public health that regulation of such sales is within the police power.

We suppose it to be unquestioned that optometry is within the police power.

State ex rel. Hallen v. *Board of Examiners*, 37 Utah 339, 108 Pac. 347 (Sup. Ct. Utah; Apr. 2, 1910).

McNaughton v. *Johnson*, 242 U. S. 344 (Jan. 8, 1917).

Price v. *State*, 168 Wis. 603, 171 N. W. 77 (Sup. Ct. Wis.; Mar. 4, 1919).

Ex parte Rust, 181 Cal. 73, 183 Pac. 548 (Sup. Ct. Calif.; Aug. 25, 1919).

Baker v. *State*, 91 Tex. Cr. Ap. Rep. 521, 240 S. W. 924 (Ct. of Cr. Appeals; June 1, 1921).

Commonwealth v. *Houtenbrink*, 235 Mass. 320, 126 N. E. 669 (Sup. Jud. Ct. Mass.; Mar. 30, 1926).

Harris v. *Board of Examiners*, 287 Pa. 531, 135 Atl. 237 (Sup. Ct. Pa.; Nov. 22, 1926).

Saunders v. *Swann*, 155 Ten. 310, 292 S. W. 458 (Sup. Ct. Ten.; Apr. 9, 1927).

The Supreme Court of Illinois held to the contrary in 1917 (*People* v. *Griffith*, 280 Ill. 18, 117 N. E. 195) but that decision has several times been questioned, and seems not to have impaired the force of an optometry act subsequently enacted in 1919 in that state. A Georgia statute was held unconstitutional, but upon narrow, and doubtful, grounds. (*Mott* v. *Board of Examiners*, 148 Ga. 55, 95 S. E. 869).

That the same public interest extends to the sale of eyeglasses and lenses for the correction of vision, whether the customer makes the selection entirely unassisted, or by the simple devices afforded by these appellants (R 2, 84), seems clear. If the State may properly regulate the fitting of eyes by experts, it has no less reason to regulate the fitting of eyes by persons without skill. In this matter the argument for regulating what is done for others, applies even for regulating what the individual does for himself. If such support is needed, the answering affidavits in the present record confirm the statements made in *Price* v. *State*, *supra*:

> "There are many ailments that are attributable to defective eyesight, which disappear when the vision is corrected by properly

fitted glasses. To properly diagnose and prescribe for the particular defect from which the patient is suffering requires a knowledge of the anatomy of the eye as well as the subject of physical optics . . . We are further informed that glasses which satisfy the patient are frequently improper, and that glasses which at the time do not seem comfortable should be insisted upon."

The selling of eyeglasses is far from being all of optometry, but it is probably the most characteristic transaction of the profession. It is the transaction which the statutes are most concerned to safeguard. The legislature of every state in the Union has, in some degree, recognized that the inexpert cannot with safety select their own eyeglasses. (See the digest of statutory provision, appended.) Several States forbid the giving of eyeglasses as a premium upon the sale of books, magazines or other goods, unless an expert examination is also provided. Many enact that eyeglasses may not be sold by peddlers, or that they may be sold only from permanent places of business. Such provisions have been sustained. (*Saunders* v. *Swann, supra; Harris* v. *Board of Examiners, supra.*)

In some States the sale of ophthalmic lenses, particularly the duplication or replacing of such a lens, can be done only upon prescriptions. See: California, Florida, Idaho, Montana, Texas, Utah and West Virginia.

Massachusetts goes to the full length of limiting to the licensed class all sales of eyeglasses for the correction of vision. The constitutionality of that statute has been upheld by a lower court.

(*Commonwealth* v. *S. S. Kresge Company*, Superior Court for Transaction of Criminal Business before Fosdick, J., Dec. 20, 1928; appeal to Supreme Judicial Court allowed Feb. 5, 1929.) Apparently Kansas, Pennsylvania and Rhode Island go to the same length in regulating sales.

Alabama and Tennessee have statutes quite similar to the one now under review. "Branch" offices of an optometrist in Pennsylvania must be "in charge of" a licensed optometrist.

This body of legislation, and the judicial decisions cited, are not without weight when the reasonable relation to public health, of sales of eyeglasses and lenses, is challenged.

The magnifying eyeglasses sold by these plaintiffs are quite within the scope of that legislation, and we have no occasion to consider the relations to the present problem of the doctrine of *Purity Extract Co.* v. *Lynch*, 226 U. S. 192.

We note that appellants now devote a point to the proposition that these lenses are harmless in themselves and cannot possibly do any injury. Although the moving affidavits seem to have provided a foundation for it, which we were at some trouble to meet in our answering affidavits, our recollection is that this issue was not argued or briefed below. See R. 74, bottom of page; and see page 33 of appellants' present brief.

However that may be, there is expert evidence in the present record contradicting the proposition. (R. 38, 39, 48, 49, 50, 52, 53, 54, 65, 66, 67.)

It is also noted that the proposition, if true, is not necessarily relevant. A useless article, even though harmless in itself, cannot be harmless when it is allowed to take and to keep the place

of a useful one. This argument might find a very forceful illustration when the improperly fitted person ventures into traffic, whether as pedestrian or motorist.

POINT II

We agree, that Section 1432-A of the Education Law does not place upon these appellants any duty to precede each sale with an examination, test or prescription.

We have no quarrel with the principal theme of pages 14 to 23 inclusive of appellants' present brief. Substantially this same point was in our brief below, and before that we had taken the same position in oral argument. (See appellants' present brief, page 14.)

We make no argument for judicial amendment of this statute; on the contrary we submit that the Legislature has set forth in unmistakable language just what it requires of these appellants and all other retailers of spectacles and lenses for the correction of vision. That is, that they do not sell unless they provide that:

> "a duly licensed physician or duly qualified optometrist, certified under this article, be in charge of and personal attendance at the booth, counter or place, where such articles are sold in such store or established place of business."

If the seller does not provide such expert attendance and supervision he is liable to prosecution. If he does provide such expert attendance and supervision he is not liable to prosecution, even though the expert makes or permits sales

without requiring or suggesting the ordinary preliminary examination.

Whether the statute, so construed, provides an adequate and reasonable regulation, is quite another question, to be considered under the next point.

There is another question of construction which may have a word here. That is the minor question, whether the physician or optometrist, placed in charge of the booth, counter or place, will be in charge of additional personnel making sales there. We submit that such control is quite clearly implied in control of the place; that control of the place for the purposes evidently in view cannot very well exist without control of personnel, if the statute is to receive a reasonable and teleological interpretation. See *United States* v. *Alford*, 274 U. S. 264, 267:

> "We regard the meaning as too plain to be shaken by the suggestion that criminal statutes are to be construed strictly. They also are to be construed with common sense."

A Minnesota statute provides as follows:

> "No person shall hereafter carry on, conduct, or transact business under a name which contains as a part thereof, the words, drugs, drug store, or pharmacy * * * unless the place of business so conducted be at all times in charge of a registered pharmacist, or during the temporary absence of such registered pharmacist, in charge of a registered assistant pharmacist."

The Supreme Court of Minnesota seems not to have doubted that the "charge" intended by the statute is over the "business" as well as the

"place." See *State* v. *Zotalis*, 172 Minn. 132, 214 N. W. 766; *State* v. *Levine*, 173 Minn. 322, 217 N. W. 342.

As to the Pennsylvania statute forbidding an optometrist from opening a branch office unless each such branch office, "is in charge of a regularly licensed optometrist," the court may have spoken somewhat loosely (*Harris* v. *Board of Examiners, supra*) when it said:

> "If it is desired to engage in business on a large scale, and cover different places with his license, he must either make the examination personally with the necessary instruments or have it done in the same way by a registered optometrist."

We have not seen fit to make that assumption concerning our statute, but we can rely upon this Pennsylvania dictum as supporting our proposition that an optometrist put in charge of a booth, counter or other place where eyeglasses and lenses are sold, has conferred upon him powers and responsibilities other than those characteristic of a janitor.

POINT III

The statute is reasonably calculated to promote the public health, and has a real and substantial relation to that end.

A legislature, in its exercise of the police power, has the burden of determining whether a specific danger to public welfare exists, and what measure is reasonably suited to averting that danger. The courts will not lightly disturb a legislative determination upon either question.

It is usually said that if the correctness of the determination is even debatable, and not clearly

arbitrary, it will be undisturbed. (*Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201–202, 204, 205; *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144; *Price* v. *Illinois*, 238 U. S. 446, 452, 453; *Hebe Co.* v. *Shaw*, 248 U. S. 297, 303; *Euclid* v. *Ambler Co.*, 272 U. S. 365, 388; *Graves* v. *Minesota*, 272 U. S. 425, 428; *Ohio ex rel. Clarke* v. *Deckeback*, 274 U. S. 392, 397.) Whether this court always adheres, in practice, to that rule, has been a matter of difference within the court in some cases where legislative determinations have been overturned. (*Adams* v. *Tanner*, 244 U. S. 590, Brandeis, Holmes and Clarke, JJ., dissenting; *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, Brandeis and Holmes, JJ., dissenting; *Weaver* v. *Palmer Bros.*, 270 U. S. 402, Holmes, Brandeis and Stone, JJ., dissenting; *Tyson & Brother* v. *Banton*, 273 U. S. 418, Holmes, Brandeis, Stone and Sanford, JJ., dissenting; *Liggett Co.* v. *Baldridge*, 278 U. S. 105, Holmes and Brandeis, JJ., dissenting.) Whatever differences there may be in practice, apparently all members of the court concede some allegiance to the rule stated in the first group of cases.

Not only is a legislature entitled to a presumption in favor of the wisdom of its determinations, it is entitled to a presumption that it has acted in good faith. At least it is not for the court to act as a conscience to the legislature. (*Fletcher* v. *Peck*, 10 U. S. 87, 130–131; *Matter of Burns*, 155 N. Y. 23, 26–27; *State* v. *Foutch*, 155 Ten. 476, 295 S. W. 469, 471.)

A legislature, having first determined that the unrestricted sale of spectacles and lenses for correction of vision constitutes a danger to the public

welfare, has next the responsibility of applying an appropriate safeguard, and can exercise some discretion in its choice of means.

No legislature, so far as we know, has ever seen fit to withhold spectacles from all persons unless they submit to preliminary examinations. Such an exercise of the police power would not be more drastic than a compulsory vaccination law, and in these days of dangerous traffic could be justified by the needs of all, including persons of perfect vision. We do not understand that appellants question the validity of such a statute; indeed, their argument suggests that no other form of statute can be valid.

Less drastic than the method mentioned above, but going just a little further than our own statute, is the Massachusetts law dealing with the same dangers. It forbids retail sales of spectacles and lenses for correcting defective vision, unless by physicians or optometrists or upon prescription.

The Massachusetts statute, and those of Kansas, Pennsylvania and Rhode Island, while not making the express provision that examination precede all sales of eyeglasses for correction of vision, doubtless tend strongly to that result, by forbidding sales except by optometrists and physicians and upon their prescriptions. Seven states make similar provision as to ophthalmic lenses, not sold as ready-to-wear spectacles, and particularly when sold for duplication or replacement.

It would seem that the New York statute, and the similar statutes of Alabama and Tennessee, and the branch office provision of Pennsylvania, all placing a licensed optometrist, or physician,

in charge of the place where eyeglasses and lenses are sold, have the same tendency, in equal force. The distinction, if any, resides in the fact that in Massachusetts the sale of eyeglasses for correction of vision is entrusted directly to the optometrist, while in New York the merchant may sell, provided he places an optometrist, "in charge of and personal attendant at," the booth, counter or place of sale.

The probable results of a statutory provision are a factor in its evaluation. (*Wuchter* v. *Pizzutti*, 276 U. S. 13.) The legislature, choosing a means for averting a particular danger, is not limited to such means as will certainly accomplish that desired result. Legislatures, like individuals dealing with their every day problems, may be satisfied by tendencies and probabilities.

An ordinance requiring a police matron to be present at the examination of a female prisoner, although prescribing no particular duties for the matron, is reasonable legislation of obvious tendency. So of the provision that a representative of the tax department be present when the safety deposit box of a decedent is opened; or that a minor shall not drive an automobile except accompanied by the owner. The legislature doubtless acted wisely and tended to the public safety when it required railroads to provide watchmen at crossings. That much accomplished, the railroad would fix their duties so as to promote public safety and avoid damage claims. The same observation holds true for the full crew bills; the railroads being required to have a certain number of employees upon a train could be trusted to prescribe their duties and see that they did not ride idly up and down the line.

The aptness of these, or similar, analogies is challenged at pages 33 to 35 of appellants' brief. It is said that the presence (we use that word only because appellants do) of the optometrist at the counter has no tendency to avoid any danger there may be in the sale of inexpertly fitted spectacles, "because the purchaser of the spectacles would have to pay a fee to procure the services of the professional man." That reason involves several unjustified assumptions, most notably that the compensation, of the optometrist put in charge of a place where eyeglasses are sold, must necessarily come in the form of a separate fee from each customer who elects to be examined.

Pharmacists, under a similar statutory requirement, have a different and less obtrusive financial arrangement. Many states, perhaps all, require that a place where drugs are sold be in charge of a licensed pharmacist. The Minnesota statute has already been quoted, and two decisions under it cited. One of the reasons given by the majority in this court, in *Liggett Co.* v. *Baldridge, supra*, why the Pennsylvania statute regulating ownership of drug stores was unreasonable, was that the same public interest supposed to be involved was sufficiently protected by other statutory provisions, among them that no one but a registered pharmacist lawfully may have charge of a drug-store.

This same argument now made here, that the statute is void because it does not go far enough, was before this court in *Rissling* v. *Milwaukee*, 271 U. S. 644 Mem., affirming *City of Milwaukee* v. *Rissling*, 184 Wis. 517, 199 N. W. 61. That ordinance required electricians to be licensed, and regulated their work and its inspection. It pro-

vided that no license should be granted to any person, firm or corporation unless there was somebody connected with him or it, either as co-partner, stockholder or employee, who had obtained six years' practical experience upon electrical work, and, "who shall be the supervisor of all work done by the licensee." Before this court the plaintiff in error urged in his brief (pp. 18–22) that the ordinance did not insure supervision, it would merely put firms on their honor to supply it, etc. Respondent answered in its brief (pp. 7–10) that the provisions for revocation of a license, not only for the licensee's own non-compliances but for any improper work done under his supervision, made the ordinance effective and proper.

We submit that the present statute, prohibiting sales at retail of spectacles and lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist is in charge and personal attendance, introduces a tendency upon which the legislature may rely, not unreasonably, to expect that purchasers will be afforded expert and professional guidance in the selection of such aids to vision.

There is an additional reason why the legislature may rely upon this tendency, in the case of physicians and optometrists. Not only is the interest of the employer involved, as in the case of the crossing watchman and the train crew, but the professional man himself has particular reasons for making his skill available to purchasers. He has at stake not only a professional reputation, but his license. Education Law, sec. 1432, provides:

> "The department shall have power to revoke any certificate of registration * * * the holder of which is * * * grossly incompetent to practice optometry."

The Regents are authorized to supervise the practising of medicine and optometry. (Education Law, secs. 51, 1416.) They make rules for that purpose, to the full extent of their statutory power, explicit and implied. Here is a peculiar reason, as the legislature may have considered, for supposing that an optometrist, placed in charge of a place where spectacles are sold, will not remain quiescent while imperfect goods are offered, while the victim of an obvious diseased condition goes unwarned, or while any goods are offered without the suggestion of an examination.

We are informed that under the practice which has grown up, the State Board of Optometrical Examiners hear all complaints lodged against members of the profession and after such hearing make a recommendation to the Education Department as to the punishment appropriate, including the recommendation of revocation of license. It is exceedingly improbable that a professional individual would completely fail to function in a professional manner when placed in charge of the selling of spectacles and lenses without subjecting himself to the action of the Board of Examiners and a revocation of his license by the Education Department. To sell a pair of spectacles without first examining the patient is comparable to a physician writing a prescription without ever having looked at the sick person. Certainly such physician would be guilty of gross incompetency and malpractice. An optometrist

selling glasses without first determining the visual acuity of the sufferer, or at least presenting to him the desirability of such an examination, would be guilty of malpractice. He would be subject, as a result of the relation in which the present statute has placed him to the sale, not only to the endangering of his license, but also to a civil suit for malpractice.

The statute, although not prescribing the professional services to be performed in connection with each sale, may be supposed, not without some reason, to tend to the safeguarding of vision. The statute is reasonably calculated to promote the public health, and has a real and substantial relation to that end.

POINT IV

The propriety of granting equitable relief in these cases is not clear.

Considering the constitutionality of the statute as an open question, newly presented, should the court even consider upon the present facts an application for injunction against the Attorney General? Exceptions may be so numerous as to eclipse the rule, nevertheless:

> "The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional." (*Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 500.)

Unless that has become an empty phrase, only uttered in cases decided upon some other principle, there remain limits to the protection the federal courts will throw about a citizen who engages in a controversy with his state as to the consti-

tutional validity of its legislation. Are the present cases so very appealing?

Is there any good reaon why these appellants should not make an effort to comply with the present statute while contesting its validity?

These appellants could defend themselves upon one violation, meanwhile obeying the statute. True, they would suffer a loss, and if the statute is unconstitutional this is a hardship we should not wish to impose. Yet we should face the fact that on the other side there is a corresponding possibility of wrong to the people of the State of New York. Where is the balance of convenience in the particular case?

Compliance with the statute, while defending upon one violation, may mean to Roschen, whose sales are small (in the original complaint stated to be about 120 pairs of spectacles annually, for about $300; compare, R 2) ~~this may mean~~ that he must retire from this particular line of business, or sell on prescription only. Possibly he can make some arrangement for part time services of an optometrist. But even if he must retire from this very small line of business entirely, pending his eventual triumph in his litigation, and thereby suffer a good will loss, which he does not claim or evaluate, should he and the similar dealers, concerning whom we have scanty information, be allowed to balance that slight and temporary personal inconvenience against the public interest which, according to the legislative determination, calls out for redress?

As for the richer corporate appellant, its moving papers afford no reason to suppose that it cannot make the temporary adjustment required by compliance with the statute pending final ad-

judication. It alleges as a conclusion (R 87), but does not support with details, that its present margin of profit is too slight to hire an optometrist, and it makes no form of assertion that its customers would not willingly absorb the added cost to them of professional service.

POINT V

The court below correctly construed the statute, and did not err in its decision.

We have nothing to add to what we have said concerning this topic. The opinion below shows careful consideration; its errors, if any, are fundamental and not of inadvertence.

POINT VI

The court below did not err in its reasons for dismissing the bills as against the defendants other than the Attorney General.

The allegation in the bills, as to the public and official duties of the District Attorney and the Board of Optometry Examiners, are mere conclusions of law, and they require no answer except that afforded by the statutes.

The Statutory Court, if it overlooked the sentences now quoted by appellants (brief, page 39), overlooked nothing of importance. If appellants believe a court could be moved to enjoin mere "preliminary inspection," they should have made defendants the Regents, or the inspectors.

We have appeared throughout for the Board. By special request of Joab H. Banton, the defendant District Attorney, and of his assistant, Mr. Benvenga, we represent all the defendants upon the present appeals, and move for affirmance.

POINT VII

The decrees below should be affirmed.

Respectfully submitted,

HAMILTON WARD,

Attorney General of the State of New York, Solicitor for Appellees.

Brief by

HENRY S. MANLEY,

Assistant Attorney General.

DIGEST OF STATUTES OF FORTY-EIGHT STATES REGULATING SALES OF SPECTACLES, EYE-GLASSES AND LENSES

The following digest has been somewhat hastily prepared, and some errors may have crept into it.

Many of the books of statutes consulted did not include statutory changes made in 1928 and 1929. In general, this digest is correct as of January 1, 1928.

A great many of the statutes commence with a definition, to the general effect that the practice of optometry is the measurement of visual acuity by any means whatever, sometimes specifying various means, and conclude with a saving clause, to the general effect that the foregoing provisions do not apply to physicians or surgeons, or to sales of eye-glasses upon prescription, or to sales of eye-glasses as merchandise. Obviously, there is considerable room for construction in determining whether eye-glasses are sold, "as merchandise," when even the simplest testing apparatus is used or made available. It is impossible, in this digest, to take notice of the small differences of language upon which such questions of construction may depend.

In general, we speak in this digest of all provisions, such as are mentioned above as a "saving clause," under that term, although in some cases a different descriptive word, such as "exception," might be more appropriate.

We do not note, in this digest, saving clauses applicable to physicians and surgeons or to sales upon prescription. We do not note prohibitions

of "peddling," when accompanied by a saving clause limited to sales from a permanent place of business.

Even where quotes are not used, the significant phrases are usually copied verbatim.

Alabama

Saving clause as to resident merchants who sell eye-glasses or spectacles as merchandise in permanently established places of business, who do not use or attempt to use, or permit to be used, a trial case or test cards, nor employ mechanical means to determine the accommodative or refractive status of the eye. Alabama Code of 1928, section 2893, provides:

> "*Store where glasses are sold; how department conducted.*—Nothing in this article shall be so construed as to prevent any person, firm, or corporation from owning or operating a store or business establishment wherein eyes are examined or glasses fitted; provided, that such store, establishment or optometric department shall be in charge of a duly licensed optometrist, whose name must appear on and in all optometry advertising of whatsoever nature done by said person, firm or corporation."

Arizona

Saving clause as to sale of spectacles and eye-glasses as merchandise from a permanently established place of business.

Arkansas

Saving clause in favor of persons who sell spectacles and lenses as merchandise from regularly established places of business. Also complete exception in favor of Civil War veterans.

California

Saving clause in favor of sale of complete ready-to-wear spectacles and eye-glasses as merchandise, by person not holding himself out as competent to make examinations. Dispensing, replacing or duplication of an ophthalmic lens or lenses without a prescription is forbidden.

Colorado

Saving clause as to persons who neither practice nor profess to practice optometry and who sell spectacles as articles of merchandise.

Connecticut

Saving clause as to dealers in spectacles or eye-glasses who neither profess to practice nor practice optometry.

Delaware

Saving clause as to one who sells spectacles or eye-glasses in the ordinary course of trade and who does not attempt to use trial case or employ mechanical means for examination.

Florida

Saving clause, with qualifications, as to sale, as merchandise, of sun or shade glasses with plain lenses. Also as to sale and replacement of spectacles and eye-glasses by person with regularly established place of business who has been in that business in the State for ten years. Unlawful for persons other than optometrists, physicians and surgeons to use in any manner any trial lenses, trial frames, test charts, etc., or to sell or replace precision lenses except upon prescriptions.

Georgia

Saving clause as to persons selling glasses as article of merchandise, or using test cards in

connection with such sales, at a permanently located place in the State, when not trafficking or attempting to traffic upon assumed skill in optometry.

Idaho

Saving clause as to persons, firms or corporations who deal in eye-glasses in a store or other permanently established place of business, who neither practice nor profess to practice optometry, who do not use in testing of the eye any lenses other than those actually sold, and who do not give or offer eye-glasses as premiums. Only an optometrist or oculist shall accept or offer to accept for duplication an ophthalmic lens or prism.

Illinois

Saving clause as to persons, firms and corporations who deal in eye-glasses or spectacles in a store or other permanently established place of business and who neither practice nor attempt to practice optometry.

Indiana

Saving clause as to resident merchants, so long as they sell spectacles as any other piece of merchandise, without representation of or qualification on the part of the seller.

Iowa

Saving clause as to merchants or dealers who sell glasses as merchandise in an established place of business and who do not practice or profess to practice optometry, which practice includes allowing public to use any mechanical device for measurement of vision.

Kansas

Practice of optometry defined to include adopting of lenses to human eye for any purpose, either directly or indirectly. It is forbidden for unlicensed persons in any manner to barter or give away any eye-glasses, spectacles, lenses or frames.

Kentucky

Saving clause as to persons who sell spectacles and lenses only as merchandise in a duly established mercantile establishment.

Louisiana

Saving clause as to retail dealers selling glasses as merchandise in their established places of business licensed by the State.

Maine

Saving clause as to resident merchants so long as they sell spectacles as any other piece of merchandise without representation of qualification in the practice of optometry on the part of the seller.

Maryland

Saving clause as to those who sell spectacles or lenses as merchandise, provided they do not practice optometry, which practice includes allowing use of instruments, test cards, test lenses, etc.

Massachusetts

Makes liable to fine and imprisonment any person, not licensed, who practices optomery, "or sells or attempts to sell spectacles, eye-glasses or lenses for the purpose of correcting defective vision." These provisions shall not apply to physicians or surgeons, or persons who do not

practice nor profess to practice optometry but who sell spectacles, eye-glasses or lenses on prescription, "or as merchandise from permanently located and established places of business when not sold for the purpose of correcting defective vision."

Michigan

Saving clause as to persons selling glasses as an article of merchandise and not trafficking or attempting to traffic upon assumed skill.

Minnesota

Unlawful for glasses to be vended as merchandise except from a permanently located and established place of business. Person displaying sign such as an eye, or employing any means for measuring vision or adapting lenses, or having testing appliances in his possession, deemed to be engaged in practice of optometry.

Mississippi

Saving clause as to merchants and druggists who are actually engaged in business in the State. These may sell and assist purchasers in fitting spectacles in their places of business at time of sale.

Missouri

Saving clause as to persons, firms and corporations who deal in eye-glasses or spectacles in a store or other permanently established place of business.

Montana

Saving clause as to persons who sell spectacles without attempting to traffic upon assumed skill in adapting them to the eye, but this may not

protect those who replace or duplicate ophthalmic lenses, or who use for testing lenses other than those actually sold.

Nebraska

Saving clause as to permanently located dealers in spectacles or eye-glasses who neither practice nor profess to practice optometry.

Nevada

Saving clause as to persons who merely sell spectacles, eye-glasses or lenses as merchandise.

New Hampshire

Saving clause as to persons who neither practice nor profess to practice optometry but who sell spectacles, eye-glasses or lenses as merchandise from permanently located and established places of business.

New Jersey

Saving clause as to persons who neither practice nor profess to practice optometry, and who sell spectacles, eye-glasses or lenses as merchandise from permanently located and established places of business.

New Mexico

Saving clause as to persons who sell spectacles or eye-glasses in the ordinary course of trade, and who do not attempt to employ subjective and objective mechanical means to determine the accommodative and refractive states of the eye.

New York

(See statute, printed in full.)

North Carolina

Saving clause as to persons who sell spectacles, eye-glasses or lenses as merchandise from per-

corporation." (Shannon's Code, sec. 3654 a 11, last paragraph, added by L. 1925, ch. 99, sec. 3.)

No optometrist may open and maintain branch offices in more than three counties. Eye-glasses or spectacles must not be peddled from door to door, nor given as a premium with books, magazines or other goods, unless the vision is to be tested and the glasses fitted without charge by an optometrist, etc.

Texas

Saving clause as to persons who sell spectacles and eye-glasses as merchandise; meaning merchants who do not practice optometry, or offer to practice optometry, but who sell spectacles or eye-glasses after they have been selected by their customers alone without aid from the merchant, either in person or indirectly, or by the provision of any mechanical or eye-testing machine or self-testing machine, etc., other than the particular and complete and ready-to-wear spectacles or eye-glasses selected by the customer in person from trays or other containers; and any other method of sale or delivery shall be construed as practicing optometry.

Utah

Saving clause as to persons, firms or corporations who sell eye-glasses or spectacles as articles of merchandise, provided they do so in the ordinary course of trade from permanently located and established places of business, do not traffic or attempt to traffic upon assumed skill in testing the eye and adapting lenses thereto, do not duplicate or replace lenses (exclusive wholesale optical

establishments, however, may do so), do not use in the testing of eyes lenses other than those actually sold, and do not give or offer to give eye-glasses or spectacles as premiums.

Vermont

Saving clause as to resident merchants who sell ready made spectacles or eye-glasses as merchandise in permanently established places of business and who do not use nor permit to be used a trial set of lenses, trial frames, test charts, etc., to aid or assist a customer in the selection of glasses or spectacles.

Virginia

Saving clause as to persons who sell spectacles, eye-glasses or lenses as merchandise from a permanently located and established place of business.

Washington

Saving clause as to persons who, in regular course of trade, sell or offer for sale spectacles or eye-glasses as regular merchandise without pretense of adapting them to the eyes of the purchaser, and not in evasion of this act. Giving away eye-glasses, spectacles, lenses or frames as premiums is forbidden.

West Virginia

Saving clause as to persons, firms or corporations who deal in eye-glasses or spectacles in a store or other permanently established place of business, and who neither practice nor attempt to practice optometry. Optometry includes the replacement or duplication of an ophthalmic lens except upon prescription.

Wisconsin

Saving clause as to sale of spectacles only at an established place of business without attempting to test the eyes, but the furnishing, using or employment of any means, device or machine, designed or calculated to aid any person in the selection or fitting of spectacles or eye-glasses, etc., shall constitute the practice of optometry.

Wyoming

Saving clause as to persons who sell spectacles, eye-glasses or lenses as merchandise from permanently located and established places of business, but who neither practice nor profess to practice optometry, nor advertise or hold themselves out as qualified to fit or adjust any lenses or lens as an aid to human eyesight.

SUMMARY

1. Five states expressly forbid giving away eye-glasses and spectacles as premiums: *Idaho, Kansas, Tennessee, Utah, Washington.*

2. Eleven states have a saving clause as to sales "as merchandise," and without the express restriction that the sale be from a "permanent place of business": *California* (merchant must not hold himself out as competent to make examinations, nor shall he dispense an ophthalmic lens except upon prescription), *Colorado, Connecticut, Delaware, Michigan, Montana* (must not use trial lenses), *Nevada, New Mexico, Ohio, Texas* (merchant must not provide testing devices), *Washington.*

3. Thirty states have a saving clause as to sales "as merchandise" and from a "permanent place of business": *Arizona, Arkansas, Florida* (mer-

chant must have been in that business in the State for ten years, and must not use testing devices), *Georgia* (must not use test cards), *Idaho* (merchant must not use trial lenses or duplicate ophthalmic lens without prescription), *Illinois, Indiana, Iowa* (must not allow use of testing device), *Kentucky, Louisiana, Maine, Maryland* (must not use testing devices), *Minnesota* (must not even possess testing devices), *Mississippi* (express provision that merchant or druggist may assist purchasers in fitting spectacles), *Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Oklahoma* (merchant must not furnish self-testing devices), *Oregon, South Carolina* (must not use trial lenses), *South Dakota, Utah* (must not use trial lenses), *Vermont* (must not use, or permit to be used, testing devices), *Virginia, West Virginia* (merchant must not replace or duplicate an ophthalmic lens without prescription), *Wisconsin* (merchant must not furnish or use any testing device), *Wyoming*.

4. Seven states have no saving clause as to sales "as merchandise," or have such a saving clause accompanied by other express provisions clearly regulating all sales of spectacles and eyeglasses for correction of defective vision in which selection and adaptation are involved: *Alabama, New York, Tennessee* (these three have provisions that an optometric store or department must be placed "in charge of" a licensed optometrist, etc.), *Kansas, Massachusetts, Pennsylvania, Rhode Island*.

EDUCATION LAW

of the State of New York

ARTICLE 54

OPTOMETRY

[*As amended to the close of legislation, 1938*]

Section 1425. Definition; application of article.
1426. State board of examiners.
1427. Powers of board.
1428. Examinations; certificates of practitioners.
1429. Degrees.
1430. Certificates to be recorded and displayed.
1431. Fees.
1432-a. Sales of eyeglasses, spectacles and lenses at retail.
1432. Revocation of certificate.
1433. Violations of article.
1434. Construction of article.
1435. Department supervision.
1436. Validity.

§ 1432. **Definition; application of article.** A person practices optometry within the meaning of this article who by any means or methods, other than by the use of drugs, diagnoses any optical deficiency or deformity, visual or muscular anomaly of the human eye, or prescribes lenses, prisms or ocular exercises for the correction or relief of the same, or who holds himself out as being able so to do. As used in this article, "regents" means the board of regents and "department" means the education department of the state of New York.

§ 1426. **State board of examiners.** The board of examiners in optometry is continued. The members of said board now in office shall continue in office until the expiration of their respective terms. Such board of examiners shall consist of five persons appointed by the regents, and shall possess sufficient knowledge of theoretical and practical optics to practice optometry and shall have been residents of this state actually engaged in the practice of optometry for at least five years. The term of each member of said board shall be five years, or until his successor is appointed, and vacancies shall be filled for the unexpired term only.

§ 1427. **Powers of board.** Said board of examiners shall, subject to the approval of the department, make such rules and regulations, not inconsistent with the law, as may be necessary for the proper performance of its duties. Any member of the board may, upon being duly designated by the board, or a majority thereof, administer oaths or take testimony concerning any matter within the jurisdiction of the board.

§ 1428. **Examinations; certificates of practitioners.** Every person desiring to commence or to continue the practice of optometry after January first, nineteen hundred and nine, except as hereinafter provided, upon presentation of satisfactory evidence, verified by oath, that he is more than twenty-one years of age, of good moral character, has a preliminary education equivalent to at least two years in a registered high school, and after January first, nineteen hundred and twenty, has graduated from a high school having a four-

year course and registered heretofore by the board of regents or hereafter by the department as maintaining a satisfactory standing, or an education accepted by the department as a full equivalent, and after receiving such preliminary education has prior to January first, nineteen hundred and thirty, graduated from a school of optometry having a course of not less than two years and maintaining a standard satisfactory to the department, and after January first, nineteen hundred and thirty, has graduated from a school of optometry conducted as a department of a university registered by the board of regents with either the degree of bachelor of arts or that of bachelor of science and a certificate of graduation in optometry, shall take an examination before the board of examiners to determine his qualifications. Every candidate successfully passing such examination shall be registered by the department as possessing the qualifications required by this article and shall receive from said department a certificate thereof.

Applicants nineteen years of age certified as having satisfactorily completed the first two years of a four-year course of optometry in an optometry school registered as maintaining at the time a satisfactory standard, may be admitted conditionally to the examination in such subjects as are prescribed to be complete with such two years.

Any person who shall submit to said board of examiners satisfactory proof as to his character, competency, and qualifications, and that he has been continuously engaged in the practice of optometry in this state for more than two years next prior to the time that chapter four hundred and

sixty of the laws of nineteen hundred and eight took effect, may upon the recommendation of said board of examiners receive from the department a certificate of exemption from such examination, which certificate shall be registered and entitle him to practice optometry under this article. Every person who was, on the twenty-first day of May, nineteen hundred and eight, when section two hundred and nine-b of the public health law, as then known, took effect, entitled to a certificate of exemption as therein provided, but who failed or neglected to make application therefor and present evidence to entitle him thereto, on or before January first, nineteen hundred and nine, as provided by said section, must make such application and present such evidence on or before July first, nineteen hundred and nine, or he shall be deemed to have waived his right to such certificate. If any person whose registration is not legal or who is not registered because of some error, misunderstanding or unintentional omission, shall submit to the state board of examiners in optometry, or to the department, satisfactory proof that he had all the requirements prescribed by law at the time required for registration and was entitled to be legally registered, he may, on unanimous recommendation of the state board of examiners in optometry, or by action of the department, receive from the department under seal a certificate of the facts which may be registered by any county clerk and shall make valid the previous imperfect registration and such certificate shall include the date on which such person could or should have registered, and his registration shall be deemed to have been valid and cor-

rected from that date. Before any certificate is issued it shall be numbered and recorded in a book kept in the office of the department and its number shall be noted upon the certificate. A photograph of the person registered shall be filed with the record and a duplicate thereof affixed to the certificate. In all legal proceedings the record and photograph so kept in the office of the department, or certified copies thereof, shall be prima facie evidence of the facts therein stated.

For the purpose of changing the status of an optometrist licensed by exemption to that of one licensed by examination, the department may admit to examination any optometrist duly licensed by exemption, who in lieu of the preliminary and professional requirements prescribed, presents satisfactory evidence that he has continuously and in conformity to law practiced optometry in the state of New York for a period of not less than ten years.

No person shall de deemed eligible to make application for a certificate of exemption or a certificate of fact after January first, nineteen hundred and twenty-three.

Upon the recommendation of the board, the department may also without the examination herein provided, endorse a certificate to practise optometry in any other state or country granted after examination by a legally constituted board of examiners in optometry upon payment of the statutory fee by the applicant and provided that his preliminary and professional education shall have been not less than those required by this state, and provided that he shall have been in reputable practice continuously for not less

than five years immediately next preceding his application.

§ 1429. **Degrees.** No degrees in optometry shall be conferred in this state except the degrees of doctor of optometry (Opt. D.) or doctor of optical science (D. O. S.).

The doctor of optometry and doctor of optical science degrees shall not be conferred upon any person who has not received either a bachelor of arts degree or a bachelor of science degree, accompanied in either case with a certificate of graduation in optometry, and who has not thereafter completed a course of two years' graduate study of the subject of optics and optometry.

Nothing in this article shall affect the standing of any degrees in optometry conferred prior to the amendment of this act.

§ 1430. **Certificates to be recorded and displayed.** Every person to whom a certificate of either registration or exemption shall be issued shall immediately cause the case to be recorded in the clerk's office in the county of his residence, and also in the clerk's office of each other county wherein he shall then practice or thereafter commence the practice of optometry and no registration in a county clerk's office thereafter shall be necessary. Every person practicing optometry shall annually in the month of June report under oath to the state board of examiners any facts required by the board, shall pay to the department a registration fee of two dollars and shall receive a certificate of registration which must be conspicuously displayed together with his original certificate of registration or exemption

in a conspicuous place in the principal office wherein he practices optometry and, whenever required, exhibit such certificate to said board of examiners or its authorized representatives.

Before the first day of June of each year the secretary of the board shall mail to every optometrist registered in the state of New York a blank application for reregistration, addressing he same in accordance with the post office address given at the last previous registration. Upon receipt of such application blank, which shall contain space for the insertion of his name, office and post office address, date and number of his license, and such other information as the department may deem necessary, he shall sign and forward this statement and application for renewal of his registration certificate to the secretary of the board, together with a fee of two dollars. Upon receipt of such application and fee, and having verified the accuracy of the same by comparison with the applicant's initial registration statements, the secretary of the board shall issue a certificate of registration which shall render the holder thereof a legal practitioner of optometry for the ensuing year.

These certificates of registration shall all bear date of July first of the year of issue, and shall expire on the thirtieth day of June in the year following. Application for registration therefor must be made during the month of June of each year, and if not so made an additional fee of one dollar for each thirty days of delay beyond the first day of July and up to the first day of January, shall be added to the regular fee. On the first day of October of each year, or within ten days thereafter, the secretary of the board shall publish and

mail to every registered optometrist in the state of New York a printed list of the legally registered optometrists within the state, and each published list shall contain at the beginning thereof these words: "Each registered optometrist receiving this list is requested to report to the secretary of the board the name and address of any persons known to be practicing optometry, whose names do not appear in this registry. The names of persons giving such information shall not be divulged." If any optometrist continues to practice optometry without registration as herein provided his license may be suspended or revoked by the department, in accordance with the provisions of this section. If any practitioner of optometry should fail to register in time for the appearance of his name in the published list of registered optometrists, in accordance with the provisions of this act, the department shall notify said delinquent to appear before them at an appointed time and place, and if his explanation of his failure to have registered shall be satisfactory, he may be reinstated and his name added to the registry; and the department may remit the additional fees accruing because of delay in registering. But should the delinquent's explanation prove unsatisfactory, the department may suspend the person from the practice of optometry for a limited season or may revoke the person's license.

Any optometrist who has been heretofore duly licensed and registered to practice in this state whose license shall not have been revoked or suspended, and who either before or after reregistration as required by this section as hereby

amended, shall have temporarily abandoned the practice of optometry or removed from the state, may reregister within this state, upon complying with the provisions of this section for reregistration, and also filing with the secretary of the board his affidavit of such facts.

Whenever practicing said profession of optometry outside of, or away from, said office or place of business, he shall deliver to each customer or person so fitted with glasses, a bill of purchase, which shall contain his signature, home, post office address, and the number of his certificate of registration or exemption, together with a specification of the lenses furnished and the price charged therefor.

§ 1431. **Fees.** The fee for such examination shall be fifteen dollars; for a certificate of registration, ten dollars; for a certificate of exemption, five dollars; for annual registration, two dollars; for any certificate of fact required of a student apprentice, one dollar; and all fees and fines required or imposed by the provisions of such article or rules shall be paid to the department and constitute a fund for expenses made necessary by this article. All fees, fines and penalties shall be paid into the state treasury and the legislature shall annually appropriate therefrom for the education department an amount sufficient to pay all proper expenses incurred pursuant to this article. The fee to be paid to the county clerk for recording an original certificate shall be fifty cents.

§ 1432. **Revocation of certificate.** The department shall have power to revoke any certificate

of registration or exemption granted by it under this article, the holder of which is guilty of any fraud, deceit or misrepresentation in his practice or in his advertising, has been convicted of crime, or is an habitual drunkard, or grossly incompetent to practice optometry. Proceedings for revocation of a certificate or the annulment of registration shall be begun by filing a written charge or charges against the accused. These charges may be preferred by any person or corporation, or the department may prefer said charges. Said charges shall be filed with the department, and a copy thereof filed with the secretary of the board of optometry examiners. The board of optometry examiners, when charges are preferred, shall designate three of their number as a committee to hear and determine said charges. A time and place for the hearing of said charges shall be fixed by said committee as soon as convenient, and a copy of the charges, together with a notice of the time and place when they will be heard and determined, shall be served upon the accused or his counsel, at least ten days before the date actually fixed for said hearing. Where personal service or service upon counsel can not be affected, and such fact is certified on oath by any person duly authorized to make legal service, the department shall cause to be published for at least seven times for at least twenty days prior to the hearing, in two daily papers in the county in which the optometrist was last known to practice, a notice to the effect that at a definite time and place a hearing will be had for the purpose of hearing charges against the optometrist upon an application to revoke his certificate. At said hearing the accused shall have the right to cross examine the wit-

nesses against him and to produce witnesses in his defense, and to appear personally or by counsel. The said committee shall make a written report of its findings and recommendations, to be signed by all its members, and the same shall be forthwith transmitted to the department. If the said committee shall unanimously find that said charges, or any of them, are sustained, and shall unanimously recommend that the certificate of the accused be revoked or his registration annulled, the department may thereupon revoke said certificate or annul said registration, or do both. If the department shall annul such registration, it shall forthwith transmit to the clerk of the county or counties in which said accused is registered as an optometrist, a certificate under its seal certifying that such registration has been annulled, and said clerk shall, upon receipt of said certificate, file the same and forthwith mark said registration "annulled." Any person who shall practice optometry after his registration has been marked "annulled" shall be deemed to have practiced optometry without registration. Where the certificate of any person has been revoked, or his registration has been annulled as herein provided, the department may, after the expiration of one year, entertain an application for a new certificate, in like manner as original applications for certificates are entertained; and upon such new application they may in their discretion exempt the applicant from the necessity of undergoing any examination.

§ 1432-a. **Sales of eyeglasses, spectacles and lenses at retail.** It shall be unlawful for any person, firm or corporation to sell, at retail, as mer-

chandise, in any store or established place of business in the state, any spectacles, eyeglasses, or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist, certified under this article, be in charge of and personal attendance at the booth, counter or place, where such articles are sold in such store or established place of business. The peddling of spectacles, eyeglasses or lenses from house to house or on the streets or highways, by a person other than such an optometrist or physician, also shall be unlawful, notwithstanding any law providing for licensing peddlers.

§ 1433. **Violations of article.** No person not a holder of a certificate of registration or exemption duly issued to him and recorded as above provided shall after January first, nineteen hundred and nine, practice optometry within this state. No person shall falsely personate a registered optometrist of a like or different name, nor buy, sell, or fraudulently obtain a certificate of registration or exemption issued to another, or advertise the practice of optometry in violation of rules to be made by the department. Practicing or offering to practice optometry, or the public representation of being qualified to practice the same by any person not authorized to practice optometry, shall be sufficient evidence of a violation of this article. And the holder of a certificate of registration or exemption practicing optometry, and having one or more places of business shall be equally liable for violations of this article by any apprentices or unlicensed employees. No person practicing or offering to practice optometry shall publicly represent himself to be a doctor, or shall assume the title of doctor or use such title or any abbrevia-

tion thereof in his practice, unless the right to use the same has been conferred upon him by some duly authorized college or university, prior to the taking effect of this act. Any violation of the provisions of this article shall be a misdemeanor and courts of special sessions shall have jurisdiction of all such violations, and any person violating any of the provisions of this article or any rule of the department relating to the practice of optometry and not inconsistent with the law shall be guilty of a misdemeanor and shall on conviction thereof be punished for a first offense by a fine of not less than fifty dollars nor more than two hundred and fifty dollars, or by imprisonment for not more than three months, or by both such fine and imprisonment, and for a second or subsequent offense by a fine of not less than two hundred and fifty dollars nor more than five hundred dollars, or by imprisonment for not more than six months, or by both such fine and imprisonment. Each act constituting a violation of this article shall be deemed to be a separate act, and the person guilty thereof shall be subject to a penalty of one hundred dollars for each such act. A right of action for the recovery of a penalty under this act may be settled or compromised by the attorney-general, either before or after proceedings are brought to recover such penalty and prior to the entry of judgment therefor. The penalties hereby imposed for a violation of the provisions of this article shall not in any way affect the liability of a person to punishment for a violation of this article upon prosecution therefor in a court of criminal jurisdiction. All prosecutions under this act shall be made by the attorney-general in the name of the people of the state and all fines and penalties shall be paid to the board and such pen-

alties may be sued for and recovered in the name of the people of the state in an action brought therefor by the attorney-general. All violations of this act when reported to the department and duly substantiated by affidavit or other satisfactory evidence shall be investigated and if the report is found to be true and the evidence substantiated the department shall report such violations to the attorney-general and request prompt prosecution. The regents may appoint such inspectors as are necessary to be paid from the funds received under this act at such salaries as they may determine for the purpose of the investigation of such violations.

§ 1434. **Construction of article.** Nothing in this article shall be construed to apply to duly licensed physicians authorized to practice medicine under the laws of the state of New York nor to the sale of toy glasses, goggles consisting of plano white or plano colored lenses or ordinary colored glasses, nor to persons who sell spectacles, eyeglasses or lenses only on prescription from such physicians or from such duly qualified optometrists, or who duplicate broken lenses.

§ 1435. **Department supervision.** The provisions of this article shall be administered subject to the provisions of section fifty-one of this chapter.

§ 1436. **Validity.** If any section of this article, or any part thereof, shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder or any other section or part thereof.